

United States
Circuit Court of Appeals
For the Ninth Circuit.

MICHAEL DOWNS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the Tax Court
of the United States

No. 11578

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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APPEARANCES

For Taxpayer:

ROBERT A. WARING.

For Commissioner:

A. J. HURLEY.

Docket No. 9643

MICHAEL DOWNS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1945

Nov. 21—Petition received and filed. Taxpayer notified. Fee paid.

21—Copy of petition served on General Counsel.

21—Request for hearing at Los Angeles filed by taxpayer. 11/27/45 Granted.

Dec. 27—Answer filed by General Counsel.

1946

Jan. 2—Copy of answer served on taxpayer, Los Angeles, Calif.

Apr. 8—Motion to advance hearing of petition filed by taxpayer. 4/11/46 granted.

16—Hearing set Jun. 10, 1946, Los Angeles, California.

June 20—Hearing had before Judge Black on the merits. Cases to be consolidated as requested by stipulation of facts. Stipulation of Facts filed. Briefs due Aug. 5, 1946. Replies due Sept. 5, 1946.

July 8—Transcript of hearing 6/20/46 filed.

1946

Aug. 1—Brief filed by taxpayer.

5—Motion for extension of time to Sept. 4, 1946 to file brief filed by General Counsel. 8/6/46 granted.

Sept. 6—Motion for leave to file the attached brief, brief lodged, filed by General Counsel. 9/9/46 granted.

9—Taxpayer's brief served on respondent.

Oct. 24—Findings of fact and opinion rendered, Judge Black. Decision will be entered for the respondent. 10/24/46 copy served.

25—Decision entered, Judge Black, Div. 15.

1947

Jan. 21—Petition for review by U. S. Circuit Court of Appeals for the Ninth Circuit filed by taxpayer.

21—Proof of service of petition for review filed.

Mar. 5—Order from U. S. Circuit Court of Appeals for the Ninth Circuit extending the time to 3/20/47 to file statement of evidence, statement of points, designation of parts of record to be printed, and designation of contents of record, with service acknowledged thereon filed.

10—Stipulation as to venue filed.

24—Agreed statement of evidence filed.

24—Taxpayer's statement of points to be relied on and designation of parts of the record to be printed filed with proof of service thereon.

1947

Mar. 24—Designation of contents of record on review with proof of service thereon filed by taxpayer. [1*]

The Tax Court of the United States

Docket No. 9643

MICHAEL DOWNS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Collector of Internal Revenue, Sixth District of California, in his notice of deficiency (Symbols IT:JBS:FWW) dated August 28, 1945, and as a basis of his proceeding alleges as follows:

1. The petitioner is a married individual with residence at 246 N. Avenue 49, Los Angeles 42, California—Serial No. 2509815-1944. The return for the period here involved was filed with the collector for the Sixth District of California. His wife's name is Eleanor J. Downs, and a like petition to this court is filed simultaneous herewith.

* Page numbering appearing at foot of page of original certified Transcript of Record.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on August 28, 1945.

3. The taxes in controversy are personal income taxes for the taxable year ending December 31, 1943, and the amount in dispute is \$225.79 plus interest in the amount of \$14.29, making a total of \$240.08. There is no dispute as to the tax on \$1891.21 received in 1942, for personal services rendered in the United States at Burbank, California, prior to June 30, 1942, for the Vega Aircraft Corporation and Lockheed Overseas Corporation, which tax [2] amounts to \$121.90 and has been paid by the taxpayer.

4. The determination of tax set forth in said notice of deficiency is based upon the following errors:

(a) In determining the net income for the year 1943, the Commissioner and Revenue Agent in Charge erroneously included the sum of \$5,438.50 earned outside of the United States by taxpayer while a bona fide resident of North Ireland.

5. The facts upon which petition relies as the basis of this proceeding are as follows:

(a) That at all times during the periods in question taxpayer Michael Downs was a bona fide resident of the British Isles and North Ireland within the meaning of the Revenue Code, particularly Sec. 116 thereof, and as the term resident is defined in Regulations 111, Section 29.211-2 thereof.

He embarked at New York City, June 30, 1942, on H.M.S. Aorangi, bound for and arriving at Glasgow, Scotland, July 14, 1942. He thereafter resided in the British Isles and North Ireland until his return to the United States on July 12, 1944, leaving the British Isles July 2, 1944, on U.S.S. George Washington.

It was his intention when he entered the employ of Lockheed Overseas Corporation to continue with them overseas for the duration of the war and as long thereafter as necessary for their performance of their agreements with the United States Army; he so committed himself in his application to the corporation before going overseas, and in May, 1943, he further signed a contract with said corporation confirming this understanding; and at no time during said period did he or could he have any definite intention to return to the United States and in fact the then hazards of war made it uncertain [3] whether he might ever be able to return to the United States.

Wherefore, petitioner prays that this court may hear the proceedings and determine that there is no deficiency due from petitioner for the year ending December 31, 1943 (including therein any deficiency for the year 1942).

/s/ ROBERT A. WARING,
Counsel for Petitioner.

State of California,
County of Los Angeles—ss.

Michael Downs being duly sworn, says that he is the petitioner above-named; that he has read the foregoing petition and is familiar with the statements contained therein and that the statements contained therein are true, except those stated to be upon information and belief, and that those he believes to be true.

/s/ MICHAEL DOWNS.

Subscribed and sworn to before me this 17th day of November, 1945.

PAULINE BLOK. [4]

[Title of Cause.]

Serial No. NI-2509815-1944

APPLICATION REGARDING HEARING
AT LOS ANGELES

To the Tax Court of the United States:

Application is hereby made to the above entitled court that the petition in above matter be heard at Los Angeles in District Sixth California at as early a date as the Court can fix for same.

Respectfully submitted.

/s/ MICHAEL DOWNS,

Petitioner,

/s/ ROBERT A. WARING,

Attorney for Petitioner. [5]

EXHIBIT A

Treasury Department, Internal Revenue Service
Los Angeles 12, California

August 28, 1945

Office of the Collector, Sixth District of California,
in replying refer to IT:JBS:FWW, Room 1242
Federal Building

Mr. Michael Downs
246 North Avenue 49
Los Angeles 42, California

Serial No. NI-2509815-1944 List

Dear Mr. Downs:

On July 24, 1945, you were notified of an apparent deficiency in your income tax for 1943 and advised of your privilege to file a protest within 30 days from that date. No protest has been received in this office.

The correct amount of the deficiency has been finally determined to be \$225.79 (see attached explanatory statement). Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter you may file a petition with the Tax Court of the United States, Washington 25, D. C., for a redetermination of the deficiency.

If you consent to the proposed assessment, you are requested to sign the enclosed agreement and notice and demand for payment will be sent you,

or you may immediately forward remittance for the deficiency tax and interest now due to the Collector of Internal Revenue, Los Angeles 12, California.

Very truly yours,

JOSEPH D. NUNAN, Jr.,

Commissioner of Internal Revenue

By HARRY C. WESTOVER,

Collector of Internal Revenue.

Enclosures:

Statement

Form 903

FWW/as [6]

Office of Collector of Internal Revenue
Los Angeles, Calif.

Acct. No. NI-2509815-1944 List

Examining Officer: Daniel Sagor

Date: July 11, 1945

In re: Michael Downs

246 North Avenue 49

Los Angeles 42, California.

Collector of Internal Revenue,
Los Angeles, California.

An examination of the returns of the above-named individual for the years 1942 and 1943 disclosed the following income tax liability:

Summary

Year	Additional Tax	Interest	District Filed
1943	\$225.79	\$14.29	Maryland

Authority for Examination: 1943 Return, Form 1040.

Taxpayer's income was derived from salaries as an employee.

Taxpayer and his spouse, Eleanor J. Downs, were married during the entire taxable year and they have three dependent minor children. Taxpayer and his spouse are California residents and their income is community income.

Taxpayer filed a nontaxable return for 1943 claiming exemption under Section 116 of the Internal Revenue Code. In a statement attached to this return taxpayer advises that "for the period from June 30, 1942 to July 12, 1944 * * * he was a bona fide resident of the British Isles and North Ireland. * * *"

Taxpayer's spouse did not file a return for 1943 claiming no taxable income.

Taxpayer has not established that he was "a bona fide resident of a foreign country or countries" within the meaning of Section 116 of the Internal Revenue Code. The amounts shown below are therefore restored to income, as community income, and the tax for 1943 determined as indicated.

Income from

Lockheed Overseas Corporation, Burbank, Calif.....	\$5,438.50
Bullock's Inc., Los Angeles, California.....	25.31
	<hr/>
	\$5,463.81
	<hr/>
One-half to each spouse.....	\$2,731.91

Corrected income tax net income.....		\$2,731.91
Less: Personal exemption	\$425.00	
Credit for dependents	700.00	1,125.00
		<hr/>
Balance (surtax net income).....		1,606.91
Earned income credit	273.19	273.19
Balance subject to normal tax.....		1,333.72
Normal tax (6% of \$1,333.72).....		80.02
Surtax on \$1,606.91		208.90
		<hr/>
Total income tax		288.92
Net victory tax		59.02
		<hr/>
Total		347.94
1942 Tax (see computation, page 3).....	32.60	
Forgiven portion	32.60	
Unforgiven portion		None
		<hr/>
		347.94
Less: Income and victory tax withheld by employer25	
Income tax paid on 1942 return.....	121.90	
		<hr/>
Total payments		122.15
		<hr/>
Unpaid balance of income and victory tax.....		225.79
Tax previously assessed		None
Additional tax		225.79
Interest to 11/29/45.....		14.29
		<hr/>
Amount recommended for assessment		\$ 240.08
		<hr/> <hr/>
Recomputation of Victory Tax		
Corrected victory tax net income.....		\$2,731.91
Less: Specific Exemption		624.00
		<hr/>
Income subject to victory tax.....		2,107.91
Victory tax before credit		105.40
Victory tax credit (44%).....		46.38
		<hr/>
		59.02

Taxpayer does not agree with findings.

Enclosures:

1943 return, Form 1040, Acct. No. NI-2509812
 (Maryland)
 with 1942 return, Form 1040 Unnumbered
 and 1942 return, Form 1040 Acct. No. Nov.
 800410 (6th Calif.)

DANIEL SAGOR,

DS:hg

Deputy Collector. [8]

Recomputation of 1942 Tax

Lockheed Overseas Corporation (Domestic income only) Burbank, California.....	\$1,180.71
Lockheed Aircraft Corporation, Burbank, Calif.....	710.50
Bullock's Inc., Los Angeles, Calif.....	886.92
Total	2,778.13
Deductions	100.50
Balance	\$2,677.63
One-half to each spouse.....	\$1,338.82
Corrected net income	\$1,338.82
Less: Personal exemption	425.00
Credit for dependents	700.00
	1,125.00
Balance (surtax net income).....	\$ 213.82
Less: Earned income credit	133.88
Balance subject to normal tax.....	79.94
Normal tax	4.80
Surtax	27.80
Total 1942 tax	\$ 32.60

Received and filed Nov. 21, 1945. [9]

[Title of Tax Court and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition, except it is denied that the return for the period here involved was filed with the Collector for the Sixth District of California.
2. Admits the allegations contained in paragraph 2 of the petition.
3. Admits as alleged in paragraph 3 of the petition that the taxes in controversy are personal income taxes for the taxable year ending December 31, 1943; denies the remainder of the allegations contained in said paragraph. [10]
- 4(a). Denies the allegations of error contained in subdivision (a) of paragraph 4 of the petition.
- 5(a). Denies the allegations contained in the first, second and third paragraphs of subdivision (a) of paragraph 5 of the petition.
6. Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ J. P. WENCHEL ECC

Chief Counsel,

Bureau of Internal Revenue.

Of Counsel:

B. H. NEBLETT,

Division Counsel.

E. C. CROUTER,

A. J. HURLEY,

Special Attorneys,

Bureau of Internal Revenue.

AJR/vp 12/17/45

Received and filed Dec. 27, 1945. [11]

The Tax Court of the United States

Docket Nos. 9643 and 9644

MICHAEL DOWNS AND

ELEANOR J. DOWNS,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

STIPULATION OF FACTS

To the Tax Court of the United States:

It is hereby stipulated and agreed, by and between the parties hereto, by their respective coun-

sel, that the petitions of Michael Downs, Docket No. 9643 and Eleanor J. Downs, Docket No. 9644, may be consolidated and heard together, and that following facts shall be taken as true, without prejudice to the right of either party to introduce other and further evidence not inconsistent therewith:

1. From January 1 to June 30, 1942, petitioner Michael Downs was employed as an aircraft mechanic in the United States by Lockheed Aircraft Corporation and Lockheed Overseas Corporation, of Burbank, California.

2. On or about April 23, 1942, he made out and signed a formal application for overseas employment by Lockheed Overseas Corporation, a true and correct copy of which application is attached hereto and made a part hereof as Exhibit 1. In connection with such employment, petitioner in May of 1942, signed a contract [12] with Lockheed Overseas Corporation in which he agreed to perform services for that company at aircraft depots operated by it in the British Isles, a true and correct copy of which contract is attached hereto and made a part hereof as Exhibit 2.

3. Pursuant to his employment and said contract, Michael Downs, on June 30, 1942, embarked on His Majesty's Steamship Orangi, a vessel of British registry.

4. Pursuant to his employment and said contract above mentioned, the expiration date of said contract was extended by agreement of the parties to

it until May 1, 1943, at which time he entered into a new contract with Lockheed Overseas Corporation, a true and correct copy of which is attached hereto and made a part hereof as Exhibit 3. The petitioner Michael Downs remained in the employ of Lockheed Overseas Corporation stationed in the British Isles and Northern Ireland until July 12, 1944, at which time he returned to the United States and to the address where he now resides at 246 North Avenue 49, Los Angeles, California.

5. During the period of Michael Downs' absence from the United States, his wife, Eleanor J. Downs, remained in the United States with petitioners' three minor children and lived at the address just above mentioned.

6. Petitioner, Michael Downs, received as compensation for personal services rendered to Lockheed Overseas Corporation in the British Isles and Northern Ireland during the year 1943, the sum of \$5,438.50, of which 90% was deposited by said Lockheed Overseas Corporation to the account of the petitioner with the California Bank in Los Angeles pursuant to the provisions of the contract of employment. [13]

7. On October 9, 1944, petitioner Michael Downs filed an income tax return for the year 1943 with the Collector of Internal Revenue at Baltimore, Maryland, in which return the petitioner excluded from his gross income the aforesaid sum of \$5,438.50, on the ground that during the said year 1943 the petitioner was a bona fide resident of a

foreign country within the meaning of Section 116 of the Internal Revenue Code.

8. The petitioner did not at any time make any application to become a citizen of Northern Ireland or a British subject. During the year 1943, petitioner was domiciled in the United States.

/s/ ROBERT A. WARING,
Counsel for Petitioners.

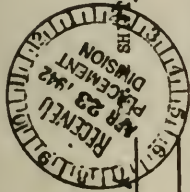
/s/ J. P. WENCHEL, ECC
Chief Counsel, Bureau of
Internal Revenue,
Counsel for Respondent.

Filed June 20, 1946.

Occupation Best Qualified for, By Code No. 117 1. 7c 2.

1 2 3

A B C



APPLICATION FOR FOREIGN SERVICE

NAME Michael Joseph CLOCK NO. 22109 OCCUP. CODE 717 16-Plant 1 - Day shift

PRINT LAST FIRST MIDDLE

PRESENT ADDRESS 246 N. Ave 49 Los Angeles CITY PHONE ---

Number Street

Are you willing to go to any part of the world? yes For how long? 1 year ☐ 2 years ☐ Longer ☒

Do you understand your services may be in a war combat zone and travel to this point will be hazardous? yes

Do you understand you may not take your wife or any member of the family? yes

Name, address, telephone No., and relation of person to be notified in Emergency Michael J. Downs - 246 N. Ave 49 - L.A. My wife -

Will you submit to rigid medical examination? yes Inoculation? yes

Race Color of hair Color of eyes Height Weight Present age Length of residence in L.A. Co. What cities? White - Brown - Blue - 5'6" - 41 - 19 yrs - 14 Los Angeles - 5 yrs. Mobile

Draft Classification None Local Board No. 196 City Los Angeles State Calif S.S. No. 562-95-6965

What military or naval experience? None

What foreign languages do you speak and/or read? None

A and/or E License no

What foreign country have you lived in? None For how long? ---

What special qualifications, Lockheed service, etc., have you? Leadman - Sta-586 - Fuel Assy - 4114 Bomber

Hydraulics and Plumbing, Electrical & Rigging - 14 months - Lockheed plant #1 -

18 yrs experience - Service Manager - Automobile Motors -

Understand every part # in plumbing - 4114 Bomber - as well as every operation

in plumbing - check my record,

Interviewed by Michael J. Downs Date 4-22-42

Signature of Applicant

Signature of Supervisor

16-Plant 1 - Day shift

EXHIBIT

#

EXHIBIT No. 2

Secret

Agreement of Employment

Agreement made this day of, 1942, by and between Lockheed Overseas Corporation, a Delaware corporation with its principal place of business in Burbank, California, and (hereinafter sometimes referred to as Employee), an individual residing at

Recitals

A. Pursuant to a certain Letter of Intent from the War Department of the United States of America (hereinafter sometimes referred to as the Government), Lockheed Aircraft Corporation, a California corporation with its principal place of business in Burbank, California, (herein called Lockheed), and the Government have entered into a contract for the organization, equipment, and operation of an aircraft depot outside the continental limits of the United States.

B. For the purpose of expediting the performance of such work, Lockheed Overseas Corporation, a wholly owned subsidiary of Lockheed, has accepted designation as major subcontractor under the above mentioned contract and has entered into a subcontract with Lockheed under which Lockheed Overseas Corporation has undertaken to organize, equip, and operate said aircraft depot. Said contract and subcontract (hereinafter for convenience referred to collectively as the Government contract)

are subject to extension of the term thereof and subject to termination by the Government under the terms and conditions therein set forth. The subsidiary, Lockheed Overseas Corporation, is hereinafter referred to as Contractor.

C. Contractor desires to employ Employee for work in connection with the organization, equipping, and operation of said aircraft depot; and Employee desires to accept such employment in accordance with the terms and conditions contained herein.

D. Employee understands that he may and probably will be called upon to render services hereunder in a war combat zone in a foreign country or countries under relatively difficult living and working conditions, and that travel of Employee may be subject to the dangers of war and travel by land, sea, and air.

Agreement

In consideration of the premises, the mutual covenants and promises herein contained, and for other good and valuable considerations, the parties hereto agree as follows:

Article 1. Time and Duration of Employment

Contractor employs Employee to render service in connection with said aircraft depot with such duties as reasonably may be assigned to him, and Employee accepts such employment with knowledge of the conditions recited above. Subject to the terms and conditions hereinafter set forth, Employee's employment hereunder shall commence when he

reports for duty at a point [16] within the United States to be designated by Contractor, at the time and place designated by Contractor, and shall continue until November 1, 1942, or such later date as may be agreed upon and thereafter until sixty (60) days after return transportation to the United States is made available by Contractor, it being understood that such return transportation shall be made available on November 1, 1942, or the later date agreed upon or as soon thereafter as is practicable under the circumstances then existing.

Article 2. Amount, Time and Mode of Payment of Salary

Employee's salary as long as he remains employed hereunder shall be at the rate of dollars per month, lawful money of the United States (sometimes hereinafter referred to as foreign salary) payable semi-monthly, in United States Dollars except as hereinafter stated, provided however, that Employee's salary while employed hereunder in the United States shall be at the rate of sixty per cent (60%) of the foreign salary.

Unless otherwise approved by Contractor, the salary payable to Employee while employed hereunder outside of the United States (less any lawful deductions including any amounts paid to Employee by Contractor at Employee's place of duty), shall be deposited for the account and at the risk of Employee in a bank in the United States to be designated by Employee or, in the absence of such designation, in a member bank of the Federal Re-

serve System to be selected by Contractor, and a duplicate deposit slip or receipt of such bank shall constitute conclusive evidence of payment to Employee.

Contractor shall pay to Employee at his place of duty from time to time, amounts which shall not in the aggregate exceed during any one (1) month, ten per cent (10%) of Employee's salary for such month, payable in pounds sterling or United States dollars, at the sole discretion of the Contractor, but the foregoing provision of this sentence shall not apply while Employee is in the United States.

The Employee shall not seek reimbursement from the Contractor for any foreign exchange loss that he may incur in converting into Sterling United States money payable to him as compensation hereunder.

Prior to debarkation at the Point of entry, Contractors shall pay the Employee the sum of Fifty Dollars (\$50.00) as an advance against his salary, and the amount of such advance shall be immediately deducted from the salary payable to or for the account of Employee thereafter or from successive salary payments in such amounts as Contractor may deem expedient or advisable.

For each continuous period of six (6) consecutive months of employment hereunder outside of the United States Contractor shall pay to Employee, in addition to the salary to which Employee is otherwise entitled, the equivalent of one-half month's foreign salary and such additional salary shall not be in lieu of pay during such reasonable

vacation leave as may be authorized by Contractor. Vacations and sick leave policies will be governed by regulations prescribed by the Contractor at the site.

Because of the emergency nature of the work and the salary to be paid to Employee, there shall be no restriction (except such as may be imposed by the medical authorities having jurisdiction) upon the number of work hours per day or the number of work days per week. The salary and compensation herein provided for Employee being substantially in excess of that which Employee has been receiving or would have received for similar services rendered in the United States at the date hereof, includes compensation for any extra and overtime services to be performed, and Employee shall not be otherwise paid or compensated for services which would ordinarily be extra or overtime services.

Failure on the part of Contractor to respond to the precise time and mode of payment of salary prescribed herein shall not be considered as a breach or default on the part of Contractor in those cases in which such failure is the result of causes beyond Contractor's control.

Article 3. Performance by Employee

Employee shall diligently and faithfully render such services and shall abide by all rules, regulations and requirements of Contractor, its officers, agents, and supervisory employees, as well as those of the United States Government and/or the War

Department, and all civil or military laws and regulations in effect from time to time at the place or places of duty hereunder during the continuance of and in connection with Employee's employment hereunder.

Article 4. Transportation

Employee consents to travel by rail, sea, and air, according to routes and by any mode of conveyance which Contractor may reasonably specify in reporting for and rendering services during employment and in traveling to and from the site.

When directed by Contractor, Employees shall return to the United States without delay by such route and means as Contractor may designate. Except as herein otherwise provided, Contractor shall furnish, cause to be furnished, or reimburse Employee for his reasonable disbursements for transportation, food, and accommodations from his present place of residence to the place of foreign duty and return to the extent that his travel is authorized or approved by Contractor.

Article 5. Passports and Preparation for Travel

This agreement is predicated upon satisfactory proof furnished by Employee that he is a citizen of the United States of America or Great Britain, and upon his ability to secure necessary passports, visas and such other permits as may be necessary to authorize his departure and absence from the United States, to pass such physical examination, and to submit to such disease immunization and

fingerprinting as may be required by proper authority or by Contractor.

If Employee is so qualified, Contractor shall obtain or cause to be obtained the necessary passports, travel permits and visas, for Employee without cost to him.

Article 6. Baggage and Property of Employee

Employee's personal baggage shall not exceed an amount to be specified by Contractor at the time of embarkation, and Contractor shall not be liable or responsible for any property of Employee or for loss or damage thereto in transit or elsewhere.

Employee shall comply with all custom and other laws and regulations of the countries from, to, or through which any of the Employee's property may be transported.

Article 7. Housing, Subsistence and Medical Services

During the time that Employee is employed hereunder and remains at the place or places of his duty outside of the United States, Contractor shall furnish or cause to be furnished, without cost to Employee, such adequate food, lodging, special clothing and equipment, medical, nursing, and hospital services and treatment and recreational facilities as circumstances may reasonably permit.

Employee shall submit prior to departure and from time to time during his employment to such vaccination, inoculation, and/or any other medical,

dental, surgical, nursing, and/or hospital treatment, preventative or curative, as the Contractor or other medical staff at the destination or elsewhere may from time to time specify, without expense to Employee.

Contractor may direct the return to the United States of Employee, if in Contractor's judgment Employee's health condition is unfavorable. [19]

Article 8. Compensation for Disability, Death,
Capture, or Detention

A. (1) For the purpose of paying workmen's compensation benefits Contractor will voluntarily provide benefits as prescribed in the United States Longshoremen's and Harbor Worker's Compensation Act, approved March 4, 1927 (44 Stat. 1424), as amended, and as extended by the Act of August 16, 1941 (Public Law No. 208—77th Congress), and such benefits shall be payable to Employee or his dependents as provided in said Act. In event the injury to Employee resulting in disability or death occurs at or about the place where Employee's services are being rendered, or during transportation to or from such place, such injury shall be presumed to have arisen out of and in the course of employment whether employee then actually was so engaged; provided, that no benefits shall be payable if the injury or death was occasioned solely by the intoxication of the Employee or by the willful intention of the Employee to injure or kill himself or another.

(2) Employee who is ascertained to be missing from his place of employment, whether or not such Employee then actually was engaged in the course of his employment, under circumstances supporting an inference that his absence may be due to the belligerent action of an enemy, or who is known to have been taken by an enemy as a prisoner, hostage, or otherwise, until such time as he is returned to his home, to the place of his employment, or is able to be returned to the jurisdiction of the United States, upon approval of Contractor and within the discretion of the Contracting officer who executed the prime contract with Contractor, or his duly authorized representative, shall be regarded solely for the purpose of this provision as deceased, and the benefits as are provided for death under the United States Longshoremen's and Harbor Worker's Compensation Act, approved March 4, 1927 (14 Stat. 1424), as amended, and as extended by the Act of August 16, 1941 (Public Law No. 208—77th Congress), shall be paid to his beneficiaries, as provided under this agreement, until such time as his return has been accomplished or he is able to be returned, or death in fact is established, or can be legally presumed to have occurred, and any payment made pursuant to this provision shall not in any case be included in computing the maximum aggregate or total payable compensation for death, as provided in the said Longshoremen's and Harbor Worker's Compensation Act, approved March 4, 1927 (44 Stat. 1424), as amended, and as extended

by the Act of August 16, 1941 (Public Law No. 208—77th Congress).

(3) If Employee, or his dependents in the event of death, be awarded benefits under any workmen's compensation law of the United States or under the workmen's compensation law of any state, territory, possession or other jurisdiction for disability, death, capture or detention, Contractor shall pay the benefits so awarded by competent authority and such payments shall be in lieu of the voluntary benefits provided in subsections (1) and (2) of this section A. [20]

(4) If this agreement provides for payment of wages or salary of Employee during any period in which Employee or his beneficiaries would also be entitled to benefits under subsections (1), (2) or (3) of this section A, any benefits so payable hereunder for disability, death, capture or detention shall be a part of, and not in addition to, the wages or salary paid during such period pursuant to this agreement.

(5) Employee shall not be entitled to salary for any period during which he does not render services hereunder because of disability or captivity and detention, nor to receive disability benefits for any period during which he is entitled to receive benefits for captivity and detention.

Article 9. Taxes

Contractor shall either pay or reimburse Employee for any and all taxes lawfully levied or

assessed by any foreign Government against Employee with respect to his residence, occupation, salary, or income, provided, however, that Employee shall immediately notify Contractor in writing of any such levy or assessment and that Employee shall not pay any of such taxes as Contractor may direct him not to pay and that any claim for reimbursement shall be asserted in writing to Contractor within thirty (30) days after such payment, and provided further that Contractor shall save Employee harmless from any monetary loss resulting from or occasioned by Employee's failure to pay such taxes in compliance with instructions or directions given by Contractor.

Article 10. Tools

Contractor shall furnish or cause to be furnished tools and equipment for rendition of services hereunder by Employee, but such tools and equipment hereunder shall remain at all times the property of Contractor.

Article 11. Termination

A. Contractor may terminate Employee's and his right to receive further salary hereunder for any of the following causes:

(1) If the Contracting Officer representing the Government requires the dismissal of Employee as deemed by him to be necessary or advisable in the interests of the Government.

(2) If Contractor has reason to believe that Employee is not trustworthy, careful, or otherwise

qualified to render the services required hereunder.

(3) If Employee, in the opinion of the medical examiner or examiners designated by Contractor, is found to be afflicted with any venereal disease.

(4) If Employee violates any of the provisions of this agreement. [21]

(5) Completion by Contractor of its contract with the Government.

(6) Termination by the Government of its contract with the Contractor.

B. Under the terms of this article, Contractor shall not arbitrarily terminate Employee's employment and Contractor shall take into consideration all extenuating circumstances that may be involved except when required by the Contracting Officer to dismiss Employee as set forth in (A) (1) of this article.

C. In the event that the Employee terminates his employment hereunder voluntarily he shall not, unless otherwise approved by the Contractor, be entitled to return transportation to the United States or reimbursement therefor.

Article 12. Military Information

This agreement includes, refers to, or incorporates classified military information within the scope of the law and regulations governing the safeguarding of military information. Employee shall comply with the requirements of the pertinent regulations, particularly paragraphs 53 and 60 of Army Regulations No. 380-5, June 18, 1941, as

they may be amended or supplemented from time to time, and with any special instructions which may be issued pursuant thereto, and shall not publish, divulge, or sell anything which includes, refers to, or incorporates such classified military information without specific authority therefor from the Government. Employees shall not at any time subsequent to entering into this agreement, without the prior written consent of Contractor and the Government as represented by the War Department, publish or cause to be published in any manner or by any means, either by statements, photographs, pictures, books, articles, reports, charts, graphs, maps, or otherwise, written, pictorial, or oral, directly or indirectly relating to this agreement, the Government contract, his employment hereunder, or any other matters relating to the organization, equipping, or operation of said aircraft depot. The provisions of this paragraph may be enforced by injunctive relief and by any other applicable legal remedies.

Article 13. Disputes

Except as otherwise specifically provided in this agreement, all disputes between Contractor and Employee concerning questions of fact arising under this contract shall be decided by the Contracting Officer who executed the Government Contract or his duly authorized representative or successor (or, if there then be no Contracting Officer, by such person, if any, as may be designated by the Secretary of War for the purpose) subject to writ-

ten appeal by either party within thirty (30) days to said Secretary of War or his duly authorized representative, whose decision shall be final and conclusive upon the parties hereto. [22]

Article 14. Employee's Work Record

Before Employee returns from the foreign site, Contractor shall make in duplicate a record of his employment stating the circumstances under which Employee is returning, upon which Employee shall set forth the nature, extent and the amount of all claims of Employee against the Contractor under or arising out of this contract or his employment hereunder. Both copies of this record shall be signed by Contractor and Employee and one copy of this record shall be given to Employee who shall present same to Contractor upon his return to continental United States. No claims of any nature shall be recognized nor shall Employee be entitled to payment of any compensation, benefits or other sums whatever except upon the presentation of such record of employment and in accordance with the entries therein contained. Should such record of employment be lost or Employee be unable for any other reason to present the same upon his return, Contractor shall, as promptly as circumstances permit, obtain a duplicate of such record from the field office at the foreign site of the work and any claims which Employee may have will be adjusted promptly upon receipt of such duplicate, but not otherwise.

Article 15. Miscellaneous

This agreement shall be construed and interpreted solely in accordance with the laws of the State of California, may not be assigned by either party without the written consent of the other party, constitutes the entire agreement between the parties hereto relating to the subject matter hereof, and shall not be binding until executed by an officer of the Contractor at its office in the City of Burbank, California.

Article 16. Headings

The headings of the various articles of this contract are for convenience and reference only and are not to be read or construed as a part of the contract.

In Witness Whereof Contractor has caused this agreement to be executed in duplicate in the City of Burbank, State of California, by its officer thereunto duly authorized and its corporate seal to be affixed hereto, and Employee has executed the same, in duplicate, the day and year first above written.

[Seal]

LOCKHEED OVERSEAS
CORPORATION,

By

President.

Witness to signature of Employee

.....
.....

Employee. [23]

Extension of Agreement of Employment

In accordance with Article I of the Employment Agreement heretofore entered into between Lockheed Overseas Corporation, a Delaware corporation, and the undersigned Employee, it is hereby agreed that the later date provided for in said Article I shall be May 1, 1943.

All other provisions of said Agreement shall remain in full force and effect except that part of Article II relating to the monthly rate of pay which is hereby changed to read from \$..... to \$.....

LOCKHEED OVERSEAS
CORPORATION,

By

.....

Employee.

Date: [24]

EXHIBIT No. 3

SECRET

Agreement of Employment

Agreement made this 7th day of April, 1943 by and between Lockheed Overseas Corporation, a Delaware corporation with its principal place of business in Burbank, California, and First Name, Initial, Last Name (hereinafter sometimes referred to as Employee), an individual residing at.....

Recitals

A. The United States of America (hereinafter sometimes referred to as the Government) and Lockheed Aircraft Corporation, a California corporation with its principal place of business in Burbank, California, (herein called Lockheed) have entered into a contract for the organization, equipment and operation of an aircraft depot outside the continental limits of the United States, the term of which contract has been extended by exchange of letters and may be hereafter further extended.

B. For the purpose of expediting the performance of such work, Lockheed Overseas Corporation, a wholly owned subsidiary of Lockheed, has accepted designation as major subcontractor under the above mentioned contract and has entered into a subcontract with Lockheed under which Lockheed Overseas Corporation has undertaken to organize, equip and operate said aircraft depot. Said contract and subcontract (hereinafter for convenience

referred to collectively as the Government contract) are subject to extension of the term thereof and subject to termination by the Government under the terms and conditions therein set forth. The subsidiary, Lockheed Overseas Corporation, is hereinafter referred to as Contractor.

C. Contractor desires to employ Employee for work in connection with the operation of said aircraft depot; and Employee desires to accept such employment in accordance with the terms and conditions contained herein.

D. Employee understands that he will probably be called upon to render services hereunder in a war combat zone in a foreign country or countries under relatively difficult living and working conditions, that he may be serving in the field with the armed forces of the United States or one or more of the United Nations and may be subject to military law and military discipline and that travel of Employee will be subject to the dangers of war and travel by land, sea and air. [25]

Agreement

In consideration of the premises, the mutual covenants and promises herein contained, and for other good and valuable considerations, the parties hereto agree as follows:

Article 1. Time and Duration of Employment

Contractor employs Employee to render services in connection with said aircraft depot with such duties as reasonably may be assigned to him, and Employee accepts such employment with knowledge

of the conditions recited above. The term of Employee's employment hereunder shall commence either

- (a) on May 1, 1943, if Employee shall, immediately prior to May 1, 1943, have been in the employ of Contractor under any other contract; or
- (b) on the date when Employee reports for duty at the time and place within the United States designed by Contractor, if Employee shall enter the employ of Contractor under this contract;

and shall continue, subject to the terms and conditions hereinafter set forth, for (i) the duration of the contract between the Government and Lockheed as from time to time extended and for such period after the termination or completion of said contract as Contractor may, in respect of such Employee, deem necessary for the winding up of the operations carried on under said contract after such termination or completion; and (ii) thereafter until return transportation to the United States for such Employee is made available by Contractor or by the Government to Contractor which transportation Contractor shall use its best efforts to obtain as promptly after the end of the period described in the foregoing clause (i) as is practicable under the circumstances then existing; and (iii) with respect to any Employee who has faithfully performed his duties and obligations hereunder throughout the term provided in the fore-

going clauses (i) and (ii) or whose employment has been terminated hereunder through no fault of the Employee under Paragraph B of Article 11 hereof, for a period of sixty (60) days after such transportation is made available; provided, however, that with respect to the sixty (60) day period provided in clause three, any employee who shall during such period enter into any other employment, including the service of the Government, shall be deemed thereby to have voluntarily terminated his employment hereunder, and any employees who shall enter into such other employment shall throughout such period perform such services as may be required of him by the Contractor.

Article 2. Amount, Time and Mode of Payment of Salary

Employee's salary as long as he remains employed hereunder shall be at the rate of (present rate) dollars per month lawful money of the United States (sometimes hereinafter referred to as foreign salary) payable monthly, in United States dollars except as hereinafter stated, provided, however, that Employee's salary [26] while employed hereunder in the United States shall be at the rate of sixty per cent (60%) of the foreign salary.

Unless otherwise approved by Contractor, the salary payable to Employee while employed hereunder outside of the United States (less any lawful deductions including any amounts paid to Employee by Contractor at Employee's place of duty) shall be deposited for the account and at the risk of Em-

ployee in a bank in the United States to be designated by Employee or, in the absence of such designation, in a member bank of the Federal Reserve System to be selected by Contractor, and a duplicate deposit slip or receipt of such bank shall constitute conclusive evidence of payment to Employee.

Contractor shall pay to Employee at his place of duty from time to time, amounts which shall not in the aggregate exceed during any one (1) month, ten per cent (10%) of Employee's salary for such month, payable in the currency of the country in which he is located or in United States dollars, at the sole discretion of the Contractor, but the foregoing provision of this sentence shall not apply while Employee is in the United States.

The Employee will not seek reimbursement from the Contractor for any foreign exchange loss.

Prior to debarkation at the point of entry, Contractor shall pay the Employee the sum of Fifty Dollars (\$50.00) as an advance against his salary, and the amount of such advance shall be immediately deducted from the salary payable to or for the account of Employee thereafter or from successive salary payments in such amounts as Contractor may deem expedient or advisable.

For each continuous period of six (6) consecutive months of employment outside of the United States under this agreement, or under this and the previous agreement, between Contractor and employee covering services in connection with the Government contract, Contractor shall pay to Employee

in addition to the salary to which Employee is otherwise entitled, the equivalent of one-half month's foreign salary, and such additional salary shall not be in lieu of pay during such reasonable vacation leave as may be authorized by Contractor. Vacations and sick leave policies will be governed by regulations prescribed by the Contractor.

Because of the emergency nature of the work and the salary to be paid to Employee, there shall be no restriction (except such as may be imposed by the medical authorities having jurisdiction) upon the number of work hours per day or the number of work days per week. The salary and compensation herein provided for Employee being substantially in excess of that which Employee has been receiving or would have received for similar services rendered in the United States at the date hereof, includes compensation for any extra and overtime services to be performed, and Employee shall not be otherwise paid or compensated for services which would ordinarily be extra or overtime services.

Failure on the part of the Contractor to respond to the precise time and mode of payment of salary prescribed herein shall [27] not be considered as a breach or default on the part of the Contractor in those cases in which such failure is the result of causes beyond Contractor's control.

Article 3. Performance by Employee

Employee shall throughout entire term of his employment hereunder, as hereinbefore provided, diligently and faithfully perform the services and

duties required of him hereunder, and shall abide by all rules, regulations and requirements of Contractor, its officers, agents, and supervisory employees, as well as those of the United States Government and/or War Department, and all civil or military laws and regulations in effect from time to time at the place or places of duty hereunder.

Article 4. Transportation

Employee consents to travel by land, sea and air, according to routes and by any mode of conveyance which Contractor may reasonably specify in reporting for and rendering services during employment and in traveling to and from the site.

When directed by Contractor, Employee shall return to the United States without delay by such route and means as Contractor may designate. Except as herein otherwise provided, Contractor shall furnish, cause to be furnished, or reimburse Employee for his reasonable disbursements for transportation, food, and accommodations from his present place of residence to the place of foreign duty and return to the extent that his travel is authorized or approved by Contractor.

Article 5. Passports and Preparation for Travel

This agreement is predicated upon satisfactory proof furnished by Employee that he is a citizen of the United States of America or Great Britain, and upon his ability to secure necessary passports, visas and such other permits as may be necessary to authorize his departure and absence from the United States, to pass such physical examination,

and to submit to such disease immunization and fingerprinting as may be required by proper authority or by Contractor.

If Employee is so qualified, Contractor shall obtain or cause to be obtained the necessary passports, travel permits and visas, for Employee without cost to him.

Article 6. Baggage and Property of Employee

Employee's personal baggage shall not exceed an amount to be specified by Contractor at the time of embarkation, and Contractor shall not be liable or responsible for any property of Employee or for loss or damage thereto in transit or elsewhere.

Employee shall comply with all custom and other laws and regulations of the countries from, to, or through which any of the Employee's property may be transported. [28]

Article 7. Housing, Subsistence and Medical Services

During the time that Employee is employed hereunder at any place or places outside of the United States, Contractor shall furnish or cause to be furnished without cost to Employee, such adequate food, lodging, special clothing and equipment, medical, nursing, and hospital services and treatment and recreational facilities as circumstances may reasonably permit.

Prior to departure from the United States, Employee shall submit to such physical examination, vaccination and inoculation as the Contractor shall direct at no expense to Employee. Thereafter Em-

ployee shall from time to time during the term of his employment submit to such further examination, vaccination, inoculation and other medical, dental, surgical, nursing and/or hospital treatment, preventative or curative as Contractor's or such other medical staff as may be specified by Contractor may from time to time require or deem necessary or desirable.

Article 8. Compensation for Disability, Death,
Capture or Detention

A. (1) For the purpose of paying workmen's compensation benefits Contractor will provide benefits as prescribed in the United States Longshoremen's and Harbor Worker's Compensation Act, approved March 4, 1927 (44 Stat. 1424), as amended, and as extended by the Act of August 16, 1941 (Public Law No. 208—77th Congress), and such benefits shall be payable to Employee or his dependents as provided in said Act. In event the injury to Employee resulting in disability or death occurs at or about the place where Employee's services are being rendered, or during transportation to or from such place, such injury shall be presumed to have arisen out of and in the course of employment whether employee then actually was so engaged; provided, that no benefits shall be payable if the injury or death was occasioned solely by the intoxication of the Employee or by the willful intention of the Employee to injure or kill himself or another.

(2) Employee who is ascertained to be missing

from his place of employment, whether or not such Employee then actually was engaged in the course of his employment, under circumstances supporting an inference that his absence may be due to the belligerent action of an enemy, or who is known to have been taken by an enemy as a prisoner, hostage, or otherwise, until such time as he is returned to his home, to the place of his employment, or is able to be returned to the jurisdiction of the United States, upon approval of Contractor and within the discretion of the Contracting Officer who executed the Government contract, or his duly authorized representative, shall be regarded solely for the purposes of this provision as deceased, and the benefits as are provided for death under the United States Longshoremen's and Harbor Worker's Compensation Act, approved March 4, 1927 (14 Stat. 1424), as amended, and as extended by the Act of August 16, 1941 (Public Law No. 208—77th Congress), shall be [29] paid to his beneficiaries, as provided under this agreement, until such time as his return has been accomplished or he is able to be returned, or death in fact is established, or can be legally presumed to have occurred, and any payment made pursuant to this provision shall not in any case be included in computing the maximum aggregate or total payable compensation for death, as provided in the said Longshoremen's and Harbor Worker's Compensation Act, approved March 4, 1927 (44 Stat. 1424), as amended, and as extended by the Act of August 16, 1941 (Public Law No. 208—77th Congress).

(3) If Employee, or his dependents in the event of death, be awarded benefits under any workmen's compensation law of the United States or under the workmen's compensation law of any state, territory, possession or other jurisdiction for disability, death, capture or detention, Contractor shall pay the benefits so awarded by competent authority and such payments shall be in lieu of the benefits provided in subsections (1) and (2) of this Section A.

(4) If this agreement provides for payment of wages or salary of Employee during any period in which Employee or his beneficiaries would also be entitled to benefits under subsections (1), (2) or (3) or this Section A, any benefits so payable hereunder for disability, death, capture or detention shall be a part of, and not in addition to, the wages or salary paid during such period pursuant to this agreement.

(5) Employee shall not be entitled to salary for any period during which he does not render services hereunder because of captivity and detention, nor to receive disability benefits for any period during which he is entitled to receive benefits for captivity and detention.

Article 9. Taxes

Contractor shall either pay or reimburse Employee for any and all taxes lawfully levied or assessed by any foreign Government against Employee with respect to his residence, occupation, salary, or income, provided, however, that Employee shall immediately notify Contractor in writing of any

such levy or assessment and that Employee shall not pay any of such taxes as Contractor may direct him not to pay and that any claim for reimbursement shall be asserted in writing to Contractor within thirty (30) days after such payment, and provided further that Contractor shall save Employee harmless from any monetary loss resulting from or occasioned by Employee's failure to pay such taxes in compliance with instructions or directions given by Contractor.

Article 10. Tools

Contractor shall furnish or cause to be furnished tools and equipment for rendition of services hereunder by Employee, but such tools and equipment hereunder shall remain at all times the property of the Contractor. [30]

Article 11. Termination

A. Contractor may terminate Employee's employment and his right to receive further salary hereunder for any of the following causes:

- (1) If the Contracting Officer representing the Government requires the dismissal of Employee as deemed by him to be necessary or advisable in the interests of the Government.
- (2) If Contractor has reason to believe that Employee is not trustworthy, careful, or is otherwise disqualified to render the services required hereunder.
- (3) If Employee, in the opinion of the medical examiner or examiners designated by Con-

tractor, is found to be afflicted with any venereal disease.

- (4) If Employee violates any of the provisions of this agreement or fails faithfully and diligently to perform the services and duties required of him hereunder.

Upon termination by the Contractor under this Paragraph A, the Contractor may in its discretion, but shall not be required to, make available to Employee return transportation to the United States but shall have no obligation to pay Employee any salary for any period from and after such termination.

B. Contractor may further terminate Employee's employment without cause under the following circumstances:

- (1) Upon or after the completion of the Government contract.
- (2) Upon or after termination by the Government of the Government contract.
- (3) If, in the opinion of the Contractor, the health or physical condition of Employee is such as to render further services by Employee hereunder undesirable.

In the event of termination by the Contractor under this Paragraph B of Article 11, Contractor shall make available to Employee return transportation to the United States and Employee shall be entitled to receive salary as provided in Article 2 hereof until such return transportation is made available

and for the period of sixty (60) days thereafter, as provided in said Article 1.

C. In the event that Employee terminates his employment hereunder voluntarily, he shall not from and after such termination be entitled to any salary hereunder or, unless otherwise approved by Contractor, to return transportation to the United States or reimbursement therefor. [31]

D. Contractor shall not arbitrarily terminate Employee's employment under Paragraph A of this Article and shall take into consideration in connection with any such termination all extenuating circumstances which may be involved, except when required by the Contracting Officer to terminate Employee's employment pursuant to sub-paragraph (1) of Paragraph A.

Article 12. Military Information

This agreement includes, refers to, or incorporates classified military information within the scope of the laws and regulations governing the safeguarding of military information. Employee shall comply with the requirements of the pertinent regulations, particularly Paragraphs 53 and 60 of Army Regulations No. 380-5, June 18, 1941, as they may be amended or supplemented from time to time, and with any special instructions which may be issued pursuant thereto, and shall not publish, divulge, or sell anything which includes, refers to, or incorporates such classified military information without specific authority therefor from the Gov-

ernment. Employee shall not at any time subsequent to entering into this agreement, without the prior written consent of Contractor and the Government as represented by the War Department, publish or cause to be published in any manner or by any means, either by statements, photographs, pictures, books, articles, reports, charts, graphs, maps, or otherwise, written, pictorial, or oral, directly or indirectly relating to this agreement, the Government contract, his employment hereunder, or any other matters relating to the organization, equipping, or operation of said aircraft depot. The provisions of this paragraph may be enforced by injunctive relief and by any other applicable legal remedies.

Article 13. Employee's Work Record

Before Employee returns from the foreign site, Contractor shall make in duplicate a record of his employment stating the circumstances under which Employee is returning, upon which Employee shall set forth the nature, extent and the amount of all claims of Employee against the Contractor under or arising out of this contract or his employment hereunder. Both copies of this record shall be signed by Contractor and Employee and one copy of this record shall be given to Employee who shall present same to Contractor upon his return to continental United States. No claims of any nature shall be recognized nor shall Employee be entitled to payment of any compensation, benefits or other sums whatever except upon the presentation of such

record of employment and in accordance with the entries therein contained. Should such record of employment be lost or Employee be unable for any other reason to present the same upon his return, Contractor shall, as promptly as circumstances permit, obtain a duplicate of such record from the field office at the foreign site of the work and any claims which Employee may have will be adjusted promptly upon receipt of such duplicate, but not otherwise. [32]

Article 14. Miscellaneous

This agreement shall be construed and interpreted solely in accordance with the laws of the State of California, may not be assigned by either party without the written consent of the other party, constitutes the entire agreement between the parties hereto relating to the subject matter hereof, and shall not be binding until executed by an officer of the Contractor at its office in the City of Burbank, State of California.

Article 15. Headings

The headings of the various articles of this contract are for convenience and reference only and are not to be read or construed as a part of the contract.

In Witness Whereof Contractor has caused this agreement to be executed in duplicate in the City of Burbank, State of California, by its officer thereunto duly authorized and its corporate seal to be

affixed hereto, and Employee has executed the same,
in duplicate, the day and year first above written.

[Seal]

LOCKHEED OVERSEAS
CORPORATION,

By
President.

Witness to signature of Employee:

.....
Interviewer Signature.

.....
Employee. [33]

Filed: T.C.U.S., June 20, 1946.

The Tax Court of the United States

7 T. C. No. 123

MICHAEL DOWNS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

ELEANOR J. DOWNS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Docket Nos. 9643, 9644

Promulgated October 24, 1946.

1. The petitioner, Michael Downs, a citizen of

the United States went to the British Isles in 1942 as an employee of Lockheed Overseas Corporation to do mechanical work important and essential to the war effort. He landed in the British Isles in July 1942 and remained there until July 1944, when he returned to the United States. After disembarking in July 1942, petitioner was first assigned to an R. A. F. base near Liverpool, England in the capacity of a field and service mechanic. Later he was transferred to Ireland for a short time after which he was moved from time to time to different air bases in England and Ireland. Held, on the facts that petitioner Michael Downs was not during 1943, a "bona fide resident of a foreign country or countries" within the meaning of section 116 of the Internal Revenue Code as amended by section 148 (a) of the Revenue Act of 1942 and the salary which he received from Lockheed is not exempt from taxation. Arthur J. H. Johnson, 7 T. C....., followed. [34]

2. The Commissioner has determined that the salary received in 1943 by Michael Downs from Lockheed was community property under the laws of California between him and his wife, petitioner Eleanor J. Downs, and has determined a deficiency against Eleanor. Because she did not file an income tax return for the year 1943, the Commissioner has added a 25 percent delinquency penalty against her for failure to file a return. In her petition Eleanor did not assign as error the action of the

Commissioner in imposing the penalty and no evidence was offered that failure to file a return for her for 1943 was due to reasonable cause and not willful neglect. Held, the Commissioner is sustained in imposing the penalty under section 3612(d)(1), Internal Revenue Code.

ROBERT A. WARING, Esq.,

For the Petitioners,

A. J. HURLEY, Esq.,

For the Respondent.

The Commissioner has determined a deficiency in income tax against Michael Downs, petitioner in Docket No. 9643 of \$225.79 for the year 1943 and he has determined a similar deficiency against Eleanor J. Downs, wife of Michael, petitioner in Docket No. 9644 for the same year of \$219.52, plus delinquency penalty of 25 percent, amounting to \$54.88. In the deficiency notice addressed to petitioner Michael Downs it was stated:

Taxpayer has not established that he was "a bona fide resident of a foreign country or countries" within the meaning of Section 116 of the Internal Revenue Code. The amounts shown below are therefore restored to income, as community income, and the tax for 1943 determined as indicated.

A statement to the same effect was made in the deficiency notice addressed to Eleanor J. Downs. Both petitioners, by appropriate assignments of

error, contest the correctness of the Commissioner's foregoing determination.

The proceedings have been consolidated.

Some of the facts have been stipulated. [35]

FINDINGS OF FACT

The stipulated facts are hereby found accordingly.

Petitioners Michael Downs and Eleanor J. Downs are husband and wife, citizens of the United States, residing in Los Angeles, California. Petitioner Michael Downs timely filed an income tax return for the taxable year 1943 with the Collector of Internal Revenue for the District of Maryland. Petitioner Eleanor J. Downs filed no return for the taxable year 1943. When the word "petitioner" is used hereafter it will generally refer to Michael Downs.

Early in 1942 Lockheed Aircraft Corporation entered into a contract with the United States Government in which the corporation agreed to organize, equip and operate an aircraft depot in Northern Ireland in connection with the war effort. The project was designated by the United States Army as operation "Magnet." In connection with the operation it was necessary for Lockheed Aircraft Corporation and its wholly owned subsidiary, Lockheed Overseas Corporation, sometimes hereafter referred to as Lockheed, to employ large numbers of skilled men in the United States and transport them to the British Isles. It was estimated that some

5,400 American citizens at one time or another, counting those who came over and returned before the completion of the job, were employed by Lockheed at the aircraft depot in Northern Ireland.

From January 1 to June 30, 1942, petitioner was employed as an aircraft mechanic in the United States by Lockheed Aircraft Corporation at Burbank, California. [36]

On or about April 23, 1942, petitioner made out and signed a formal application for overseas employment with Lockheed and in connection with such application signed a contract shortly thereafter with the corporation in which he agreed to perform services for the company at an aircraft depot to be operated by it in the British Isles. The application which petitioner signed for employment with Lockheed was headed: "Application for Foreign Service." The application contained the following question:

Are you willing to go to any part of the world? Yes.

For how long? 1 year 2 years Longer X.

Petitioner in his application for foreign service thus indicated a willingness to serve as an employee of Lockheed overseas for more than two years, if necessary. The contract which petitioner signed provided inter alia as follows:

Article 1. Time and Duration of Employment

Contractor employs Employee to render services in connection with said aircraft depot with such duties as reasonably may be assigned

to him, and Employee accepts such employment with knowledge of the conditions recited above. Subject to the terms and conditions hereinafter set forth, Employee's employment hereunder shall commence when he reports for duty at a point within the United States to be designated by Contractor, at the time and place designated by Contractor, and shall continue until November 1, 1942, or such later date as may be agreed upon and thereafter until sixty (60) days after return transportation to the United States is made available by Contractor, it being understood that such return transportation shall be available on November 1, 1942, or the later date agreed upon or as soon thereafter as is practicable under the circumstances then existing.

Article 7, Housing, Subsistence and Medical Services

During the time that Employee is employed hereunder and remains at the place or places of his duty outside of the United States, Contractor shall furnish or cause to be furnished, without cost to Employee, such adequate food, lodging, special clothing and equipment, medical, nursing, and hospital services and treatment and recreational facilities as circumstances may reasonably permit.

Employee shall submit prior to departure and from time to time during his employment to such vaccination, inoculation, and/or any other medical, dental, surgical, nursing, and/or

hospital treatment, preventative or curative, as the Contractor or other medical staff at the destination or elsewhere may from time to time specify, without expense to employee.

Contractor may direct the return to the United States of Employee, if in Contractor's judgment Employee's health condition is unfavorable.

Article 9. Taxes

Contractor shall either pay or reimburse Employee for any and all taxes lawfully levied or assessed by any foreign Government against Employee with respect to his residence, occupation, salary, or income, provided, however, that Employee shall immediately notify Contractor in writing of any such levy or assessment and that Employee shall not pay any of such taxes as Contractor may direct him not to pay and that any claim for reimbursement shall be asserted in writing to Contractor within thirty (30) days after such payment, and provided further that Contractor shall save Employee harmless from any monetary loss resulting from or occasioned by Employee's failure to pay such taxes in compliance with instructions or directions given by Contractor.

Pursuant to the terms of his contract, petitioner left the United States for the British Isles on June 30, 1942 and landed several weeks later in Glasgow, Scotland. [38]

Petitioner was admitted to the British Isles on a visa as an employee of Lockheed. This visa, under British law, had to be put in use within three months from the date it was issued but the time that the holder would be allowed to stay is not mentioned therein. The visa, under British law, would permit him to remain for the purpose for which it was given, as an employee of Lockheed, and if and when Lockheed terminated its work over there, petitioner would be expected to depart within a reasonable time when transport was available and subject to any extensions that might be given him by the home office in London or local authorities in Belfast.

After disembarking petitioner was first assigned to an R. A. F. base near Liverpool, England, in the capacity of a field and service mechanic. Later he was transferred to Ireland for a short time after which he was moved from time to time to different air bases in England and Ireland where he performed essential services for the British Air Force, the American Air Force and the Polish Air Force, always as an employee of Lockheed.

The expiration date of petitioner's contract was extended by agreement of the parties until May 1, 1943, at which time he entered into a new contract with Lockheed. This new contract provided, *inter alia*, as follows:

Article 1. Time and Duration of
Employment

Contractor employs Employee to render services in connection with said aircraft depot with such duties as reasonably may be assigned

to him, and Employee accepts such employment with knowledge of the conditions recited above. The term of Employee's employment hereunder shall * * *

* * * continue, subject to the terms and conditions hereinafter set forth, for (i) the duration of the contract between the Government and Lockheed as from time to time extended and for such period after the termination or completion of said contract as Contractor may, in respect of such Employee, deem necessary for the winding up of the operations carried on under said contract after such termination or completion; and (ii) thereafter until return transportation to the United States for such Employee is made available by Contractor or by the Government to Contractor which transportation Contractor shall use its best efforts to obtain as promptly after the end of the period described in the foregoing clause (i) as is practicable under the circumstances then existing; * * *

The petitioner remained in the employ of Lockheed stationed in the British Isles and Northern Ireland until July 12, 1944, when he returned to the United States and to the address where he now resides in Los Angeles, California. During the period of petitioner's absence from the United States, his wife Eleanor remained in the United States with petitioner's three minor children and lived at the family residence in Los Angeles.

Petitioner received as compensation for personal

services rendered to Lockheed in the British Isles and Northern Ireland during the year 1943 the sum of \$5,438.50 of which 90 percent was deposited by the corporation to the account of the petitioner with the California Bank in Los Angeles pursuant to Article 2 of his employment contract.

Petitioner did not at any time make application to become a citizen of Northern Ireland or a British subject. During the taxable year 1943 he was domiciled in the United States and intended to return to this country as soon as the war in Europe was over. He did not pay any income taxes to the Government of Northern Ireland or the United Kingdom of Great Britain for the year 1943. [40]

On October 9, 1944, petitioner Michael Downs filed an income tax return for the year 1943 with the Collector of Internal Revenue at Baltimore, Maryland, in which return he excluded from his gross income the aforesaid sum of \$5,438.50 on the ground that during the entire year of 1943 he was a bona fide resident of a foreign country within the meaning of section 116 of the Internal Revenue Code.

Any of the stipulated facts not embodied in the foregoing findings are incorporated herein by reference.

OPINION

Black, Judge: There is but one issue in these consolidated proceedings and that is whether the \$5,438.50 which the petitioner earned in 1943 while an employee of Lockheed Overseas Corporation is

exempt from taxation under the provisions of section 116, I.R.C., printed in the margin.¹

There is no dispute as to the underlying facts in the instant case. The only dispute is as to the ultimate fact. Petitioner contends that on the facts which have been stipulated, and those proved at the hearing, we should find that during the entire year 1943 he was a "bona fide resident of a foreign country or countries" within the meaning of section 116 I.R.C. Respondent asks us to find on these same facts that petitioner was not a "bona fide resident of a foreign country or countries" during the period in question.

¹Sec. 116. Exclusions from Gross Income.

In addition to the items specified in section 22(b) the following items shall not be included in gross income and shall be exempt from taxation under this chapter:

(a) Earned Income From Sources Without the United States.—

(1) Foreign resident for entire taxable year.—In the case of an individual citizen of the United States, who establishes to the satisfaction of the Commissioner that he is a bona fide resident of a foreign country or countries during the entire taxable year, amounts received from sources without the United States (except amounts paid by the United States or any agency thereof) if such amounts would constitute earned income as defined in section 25(a) if received from sources within the United States; but such individuals shall not be allowed as a deduction from his gross income any deduction properly allocable to or chargeable against amounts excluded from gross income under this subsection.

In the consideration of the issue we have here to decide, certain things are clear. When petitioner went overseas in 1942 he had no intention of changing his domicile. At all times material hereto petitioner's domicile was in the United States. He concedes that. We agree with petitioner that the fact that at no time material hereto did he have any intention of changing his domicile is not decisive of the question we have here to decide. It is also clear that petitioner was physically absent from the United States during the entire taxable year 1943, and during this time he was engaged in important and essential work in the war effort as an employee of Lockheed at the aircraft depot established in Northern Ireland and elsewhere in the British Isles. Both parties seem to agree in their briefs that there are many and varied definitions of the word "residence" to be found in adjudicated cases in the law books not having to do with income taxes, and that these definitions are of little help in deciding the issue which we have here. They are in agreement that inasmuch as section 116 I.R.C. does not define the meaning of "bona fide residence of a foreign country or countries" that the Treasury Regulations must be looked to to find the correct interpretation of the words thus used in the statute. [42] Both parties seem to agree that the applicable regulations are those printed in the margin.² The legislative his-

²Regulations 111.

Sec. 29.116-1. Earned Income From Sources Without the United States.—For taxable years beginning after December 31, 1942, there is excluded from gross income earned income in the case of an individual citizen of the United States provided the

tory of section 116 I.R.C. printed in footnote 1 has been fully discussed in Arthur J. H. Johnson, 7 T.C. . . . , this day decided. Also Treasury Regulations 111, sections 29.116-1 and 29.211-2 printed in margin 2 were analyzed and discussed in [43] that case. We shall not repeat that legislative history and discussion here. In the Johnson case we held on the facts present therein that the taxpayer was not during 1943 a bona fide resident of a "foreign country or countries" within the meaning of section 116 I.R.C. On authority of that case, we think we must make the same holding here. It is true, of course, that there are some differences in the facts of the Johnson case from those of the instant case, but we do not think those differences are sufficient

following conditions are met by the taxpayer claiming such exclusion from his gross income: (a) It is established to the satisfaction of the Commissioner that the taxpayer has been a bona fide resident of a foreign country or countries throughout the entire taxable years; (b) such income is from sources without the United States; (c) the income constitutes earned income as defined in section 25(a) if received from sources within the United States; and (d) such income does not represent amounts paid by the United States or any agency or instrumentality thereof. * * * Whether the individual citizen of the United States is a bona fide resident of a foreign country shall be determined in general by the application of the principles of sections 29.211-2, 29.211-3, 29.211-4, and 29.211-5 relating to what constitutes residence or nonresidence, as the case may be, in the United States in the case of an alien individual.

* * *

Sec. 29.211-2. Definition.—

* * *

An alien actually present in the United States

to make the cases distinguishable as to the result reached.

Petitioner in arguing that during 1943 he was a "bona fide" resident of a foreign country or countries within the meaning of section 116, says in his brief:

These two Latin words "bona fide" mean acting in "good faith." These words were wisely designed to prevent persons not acting in good faith from traveling out of the country just to avoid taxes thereby—taking a trip perhaps at the expense of the government. The

who is not a mere transient or sojourner is a resident of the United States for purposes of the income tax. Whether he is a transient is determined by his intentions with regard to the length and nature of his stay. A mere floating intention, indefinite as to time, to return to another country is not sufficient to constitute him a transient. If he lives in the United States and has no definite intention as to his stay, he is a resident. One who comes to the United States for a definite purpose which in its nature may be promptly accomplished is a transient; but if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and to that end the alien makes his home temporarily in the United States, he becomes a resident, though it may be his intention at all times to return to his domicile abroad when the purpose for which he came has been consummated or abandoned. An alien whose stay in the United States is limited to a definite period by the immigration laws is not a resident of the United States within the meaning of this section, in the absence of exceptional circumstances.

purpose was to prevent persons acting in bad faith from tax avoidance by false claims.

The good faith of Michael Downs surely cannot be seriously questioned by the Commissioner. * * *

We agree that the good faith of petitioner in going overseas as an employee of Lockheed, and rendering important and essential services to the war effort cannot be questioned. We do not understand that it is being questioned by the Commissioner. The Commissioner states in his brief that his attitude in this sort of cases is correctly stated in I.T. 3642, Cum. Bull. 1944, page 262. In that I.T. advice was requested whether A, a citizen of the United States who went to Canada on January 1, 1943, where he was employed on a war project during the entire year 1943, and who intended to remain in Canada until May, 1944, was entitled under section 116(a)(1) I.R.C. [44] as amended by section 148(a) of the Revenue Act of 1942, to exclude from gross income for Federal income tax purposes for the taxable year 1943 the compensation received by him for personal services rendered in Canada during that year. The answer to the advice requested was stated in the I.T. as follows:

In determining whether a citizen of the United States is a bona fide resident of a foreign country or countries within the meaning of section 116(a)(1) of the Code, * * * the tests generally applicable will be those used in ascertaining whether an alien is a resident of the

United States. * * * Mere physical presence in a foreign country or countries during the entire taxable year is not of itself sufficient to constitute a citizen of the United States a bona fide resident of such country or countries for the purpose of section 116(a)(1) of the Code. The burden of proof is on the taxpayer to establish to the satisfaction of the Commissioner that he was a "bona fide resident" of a foreign country or countries throughout the entire taxable year.

A citizen of the United States who is employed in a foreign country on a war construction project and living in more or less temporary quarters which he will in all probability abandon upon the termination of such employment in the foreign country, must be classified as a transient (with respect to such foreign country), and not as a bona fide resident of a foreign country within the meaning of section 116(a)(1) of the Internal Revenue Code, as amended, *supra*.

While the administrative interpretations in the form of I.T.s do not, of course, have the same force and effect as departmental regulations and rulings, it is believed that in a case such as we have here where Congress has in express language vested in the Commissioner discretionary powers to determine certain questions of fact in the administration of the statute, the Commissioner's administrative interpretation in effect at the time the deficiency was determined should be accorded some con-

sideration, particularly where they reveal a uniform and consistent practice. Of course, if [45] the office construction given in I.T. 3642, *supra*, was wrong, it should be given no weight, but we are not convinced that it was wrong. While, as we have already said, petitioner for the entire year of 1943 was overseas and was rendering valuable and essential services as an employee of Lockheed to the war effort, nevertheless, we do not think it can be said, under the facts, that he was a "bona fide resident of a foreign country or countries" during such period under section 116. Following our decision in *Arthur J. H. Johnson*, *supra*, we decide this issue in favor of respondent.

The deficiency determined against Michael Downs did not impose any delinquency penalty because it was stated in the deficiency notice that "Taxpayer filed a nontaxable return for 1943 claiming exemption under Section 116 of the Internal Revenue Code."

In the determination of the deficiency against Eleanor J. Downs, the Commissioner added a delinquency penalty of 25 per cent, stating as a reason therefor: "Mrs. Downs did not file a return in the belief that her share of the community income was nontaxable income and that she had no filing requirement." The petition filed by her in Docket No. 9644 did not assign any error as to the imposition of this delinquency penalty. It simply alleged that in his determination of the deficiency the Commissioner "erroneously included the sum of \$5438.50 earned outside the United States by

taxpayer's husband, while a bona fide resident of North Ireland." Of course, if that allegation of error had been sustained there would have been no deficiency and therefore no penalty. Neither party in his brief discusses the delinquency penalty imposed in the case of Eleanor. Where a delinquency penalty has been imposed the burden of proof is on the taxpayer [46] to show that his failure to file a return was due to reasonable cause and not to wilful neglect. No such showing has been made in the instant case. Therefore the delinquency penalty determined against petitioner Eleanor J. Downs must stand. See section 3612(d)(1) I.R.C. See also Economy Savings and Loan Co., 5 T.C. 543.

Reviewed by the Court.

Decisions will be entered for the respondent.

Leech, J., dissents.

[Seal] [47]

The Tax Court of the United States
Washington

Docket No. 9643

MICHAEL DOWNS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Court, as

set forth in its Findings of Fact and Opinion promulgated October 24, 1946, it is

Ordered and Decided: That there is a deficiency in income tax for the calendar year 1943 in the amount of \$225.79.

/s/ EUGENE BLACK,
Judge.

Entered: Oct. 25, 1946. [48]

In the Tax Court of the United States

Docket No. 9643

MICHAEL DOWNS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket No. 9644

ELEANOR J. DOWNS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

STIPULATION AS TO VENUE

Pursuant to Section 1141 (b) (2) of the Internal Revenue Code and under the authority of Industrial

Ass'n vs. Commissioner, 323 U. S. 310, the parties hereto, through their respective counsel, hereby stipulate and agree to, and do, designate the United States Circuit Court of Appeals for the Ninth Circuit as the court to review the above-entitled causes.

/s/ROBERT A. WARING,
Counsel for Petitioners.

/s/ SEWALL KEY,
Acting Assistant Attorney
General,
Counsel for Respondent.

Dated this 3rd day of March, 1947.

Received and filed March 10, 1947. [49]

United States Circuit Court of Appeals
for the Ninth Circuit

Docket No. 9643

MICHAEL DOWNS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REVIEW OF DECISION OF
THE TAX COURT OF THE UNITED
STATES

To the Honorable Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:

Comes now Michael Downs, petitioner herein and respectfully shows:

I.

Nature of the Controversy

The Respondent determined a deficiency in the income tax against the Petitioner for the calendar year 1943 in the amount of \$225.79.

This deficiency arose from the denial of taxpayer's claim to exemption from individual income tax for the calendar year 1943, of his salary from Lockheed Overseas Corporation while a bona fide resident of the British Isles and North Ireland [50] within the meaning of Sec. 116(a)(1) as amended by Sec. 148 (a) of the Revenue Act of 1942 and under Sec. 29.211-2 of Treasury Regulations 111.

In a companion proceeding, the Commissioner also determined a deficiency of \$219.52 and a penalty of \$54.88 against Eleanor J. Downs, wife of petitioner, for the calendar year 1943, arising from the denial above specified.

Petitioner and his wife, Eleanor J. Downs, each filed an appeal to the Tax Court of the United States, which appeals were, upon trial thereof, consolidated for trial and opinion.

Thereafter on October 25, 1946, The Tax Court of the United States rendered its decision in favor of the respondent. Said decision describes in detail the controversy involved, which briefly is as follows:

Early in 1942, Lockheed Aircraft Corporation (L. A. C.) entered into a contract with the United

States government to organize, equip and operate an aircraft depot at Belfast in Northern Ireland to employ a large number of skilled mechanics (ultimately some 5,400 American citizens in all). These were picked mechanics from varied industries throughout the United States but mostly from aircraft industries in California. Actually the operation was under a subsidiary, Lockheed Overseas Corporation (L. O. C.) and was under direction of the U. S. Army as operation "Magnet."

Downs was employed at Burbank, California, by L. A. C. from Jan. 1, 1942, until about April 23, 1942, when he made [51] application and signed a contract for overseas employment with L. O. C. and shifted to same. In his written application he stated that he was willing to stay for over two years. The contract provided that L. O. C. would reimburse him for any and all taxes lawfully levied or assessed by any foreign government against him while an employee of the corporation in the British Isles and North Ireland.

On June 30, 1942, he embarked at New York Harbor on the H. M. S. Orangi, a vessel of British Registry, arriving in the British Isles about July 14, 1942, where he was first assigned to an R. A. F. base near Liverpool in the capacity of a field and service mechanic. Later he was transferred to Ireland for a short time; after which he was moved from time to time to different air bases in England and Ireland.

As of May 1, 1943, he entered into a written contract with Lockheed in which he agreed to render

such services in connection with said aircraft depot as might reasonably be assigned to him for the duration of the contract between the Government and Lockheed as from time to time extended (which meant for the duration of the war and beyond).

Under the conditions of his contract and of the contract between our Government and Lockheed he could not take his family with him had he wanted to do so and they remained in their home in Los Angeles, his wife and their three minor children.

At no time during his stay overseas did the British demand any income tax of him nor did our Treasury Department require any income tax to be withheld from his salary by L. O. C. although ninety per cent of said salary was deposited by L. O. C. to the credit of Downs in his Bank in the United States per Article 2 of his employment contract.

Within ninety days of his return, July 12, 1944, to New York City, taxpayer made an income tax return of his total salary, domestic and foreign, earned for the calendar years 1942, 1943 and 1944, to the Collector at Baltimore, Maryland, in which he claimed to be exempt from individual income tax for the period he was overseas on the ground that he was then a bona fide resident of the British Isles as first herein noted. These returns were later transferred to the Los Angeles office of the Collector and the deficiency tax herein at issue was assessed by that office.

In its opinion, The Tax Court points out that taxpayer and the Government agree that in as much as Sec. 116 I.R.C. does not define the meaning of

“bona fide resident of a foreign country or countries,” that Treasury Regulations 111, Sec. 29.116-1 and 29.211-2 must be looked to to find the correct interpretation of the words thus used in the statute.

The pertinent part of the latter section which is decisive of the issue here involved, defines a resident for the purpose of the income tax. It is designed to tax aliens resident in this country but has been repeatedly held by the Treasury Department [53] and The Tax Court to equally apply in reverse to citizens of the United States while abroad. The substantial part of the Section reads thus:

“* * * One who comes to the United States for a definite purpose which in its nature may be promptly accomplished is a transient; but if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and to that end the alien makes his home temporarily in the United States, he becomes a resident, though it may be his intention at all times to return to his domicile abroad when the purpose for which he came has been consummated or abandoned.”

The Tax Court, conceding there could be no question of the bona fides or good faith of taxpayer, but disregarding the plain language of the above Regulations, found that Congress had in express language vested in the Commissioner discretionary powers to determine this question of residence and that the attitude of the Commissioner is correctly stated in I. T. 3642 Cum. Bull. 1944, page 262. This

I. T. concerns a citizen of the United States who went to Canada Jan. 1, 1943, on a war project for the year 1943 and who intended to remain there until May, 1944.

Following its decision in *Arthur J. H. Johnson*, 7 T.C., decided the same day as the *Downs* case, The United States Tax Court held that Michael Downs was not a bona fide resident of the British Isles for the calendar year and that his overseas income for that year was therefore taxable. So closely is the *Downs* decision tied into that of *Johnson* that one cannot well read the *Downs* decision without a copy of the *Johnson* decision and yet the *Johnson* case is not in point because he went to Greenland for a limited period; where, under a "condition unique in [54] history" (in the language of the Tax Court) the United States, in a treaty with Denmark, had complete jurisdiction in the bases in Greenland over all persons except Danish citizens and native Greenlanders.

Petitioner contends that the Tax Court erred in the following particulars:

(a) In finding as a fact or deciding as a matter of law that the Commissioner of Internal Revenue has discretionary power to disregard the plain language of Regulations 111, Sec. 29.211-2, as above quoted, and assess the tax here involved;

(b) In finding as a fact or deciding as a matter of law that I. R. C. Sec. 116 (a) (1) vested in the Commissioner discretionary power to determine that taxpayer was not a resident of the British

Isles for the taxable year 1943, even though he acted bona fide and met the conditions of Regulations 111, Sec. 29.211-2.

II.

The Court in Which Review Is Sought

The United States Circuit Court of Appeals for the Ninth Circuit is the Court in which review of said decision of The Tax Court of the United States is sought pursuant to the provisions of Section 1141 of the Internal Revenue Code. [55]

III.

Venue

For more than two years last past preceding, petitioner has resided in the County of Los Angeles, State of California. The deficiency notice involved in this appeal was issued by the Collector of Internal Revenue at Los Angeles in the Sixth District of California, whose office is located within the Ninth Judicial Circuit of the United States. The hearing before the United States Tax Court was held in Los Angeles, California.

The parties hereto have not stipulated that said decision may be reviewed by any Court of Appeals other than the one herein designated.

Wherefore, the Petitioner prays that the decision of The Tax Court of the United States herein be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit; that a transcript of the record be prepared in accordance with the law and rules of said Court and transmitted to the Clerk of said Court for filing; and that appropriate action

be taken to the end that the errors complained of may be reviewed and corrected by said Court.

Dated: January 18, 1947.

ROBERT A. WARING,
Attorney for Petitioner.

Received and filed T.C.U.S., Jan. 21, 1947. [56]

[Title of Circuit Court of Appeals and Cause.]

NOTICE OF FILING PETITION
FOR REVIEW

To: John P. Wenchel, Chief Counsel, Bureau of
Internal Revenue, Washington, D. C.,
Attorney for the Respondent:

Please Take Notice that on the 21st day of January, 1947, the undersigned filed with the Clerk of the Tax Court of the United States the petition of Michael Downs, a copy of which is annexed hereto, for the review by the United States Circuit Court of Appeals for the Ninth Circuit of the final order and decision of the Court heretofore rendered in the above-entitled case. Dated this 21st day of January, 1947.

ROBERT A. WARING,
Attorney for the Petitioner.

Admission of Service

Service of a copy of the above notice and a copy

of the petition for review is hereby accepted this 21st day of January, 1947.

/s/ J. P. WENCHEL,

Chief Counsel, Bureau of Internal Revenue, Attorney for Respondent.

Filed T.C.U.S., Jan. 21, 1947. [57]

[Title of Circuit Court of Appeals and Cause.]

PETITIONER'S STATEMENT OF POINTS
TO BE RELIED ON AND DESIGNATION
OF PARTS OF THE RECORD TO BE
PRINTED

Comes now Michael Downs, the petitioner for review in the above entitled cause, and states that the points on which he intends to rely in this cause are as follows:

1. The Tax Court of the United States erred in finding as a fact or deciding as a matter of law that the Commissioner of Internal Revenue has discretionary power to disregard the plain language of Regulations 111, Section 29.211-2, and assess the tax here involved;

2. The said Tax Court erred in failing to find as a fact and to decide as a matter of law that petitioner, under said Section 29.211-2 of said Regulations was a bona fide resident of the British Isles and North Ireland for the calendar year 1943, and exempt from income tax on his overseas salary of \$5438.50 for that year.

3. The said Tax Court erred in finding as a fact or deciding as a matter of law that I.R.C., Section 116 (a) (1) vested in the [58] Commissioner discretionary power to determine that petitioner was not a resident of the British Isles for the taxable year 1943, even though he acted bona fide and met the conditions of Regulations 111, Section 29.211-2; and said Court erred in failing to find that under said section of I.R.C. and under said section of said Regulations, petitioner was exempt from income tax on his said overseas salary.

Petitioner hereby designates the entire record, as certified to the Clerk of the above entitled Court, as necessary to be printed for the consideration of the points set forth above.

/s/ ROBERT A. WARING,
Attorney for Petitioner.

Service admitted March 21st, 1947.

/s/ J. P. WENCHEL. EMP

Received and filed T.C.U.S., March 24, 1947. [59]

The Tax Court of the United States

Docket No. 9643

MICHAEL DOWNS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STATEMENT OF EVIDENCE

The following is a statement of evidence in narrative form in the above entitled cause.

This cause came on for hearing before Honorable Eugene Black, Judge of The Tax Court of the United States, on June 20, 1946, Robert A. Waring, Esq., appearing on behalf of Petitioner and A. J. Hurley, Esq. (Honorable J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue), appearing on behalf of Respondent.

It was stipulated between Counsel that the cases of Michael Downs, Docket No. 9643 and Eleanor J. Downs, Docket No. 9644, be consolidated and the Court so ordered.

Stipulations of facts between counsel for petitioner and respondent were received by the Court, in evidence as Petitioner's Exhibit No. 1.

On being asked by the Court if he wished to make an opening statement of the facts,

Mr. Waring, for petitioner, stated that Section 116(a)(1) of the Revenue Code in effect for the calendar year 1943 extends an exemption from income tax in the case of an individual citizen of the United States who establishes to the satisfaction of the Commissioner that he is a bona fide resident of a foreign country or countries, during the entire taxable year; that he would prove that there was no question about the bona fides or good faith of these Lockheed Overseas men.

And secondly, that he expected to prove that petitioner was a resident over there within the plain

language of Regulations 111 Section 29.211-2(b) which, in reverse, applies to our citizens abroad. The section in part reads—"One who comes to the United States for a definite purpose which in its nature may be promptly accomplished is a transient; but if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and to that end the alien makes his home temporarily in the United States, he becomes a resident, though it may be his intention at all times to return to his domicile abroad when the purpose for which he came has been consummated or abandoned——". The government admits that this provision applies in reverse to citizens of the United States.

Within the language of this section he would not attempt to prove that these men intended to stay over there permanently or got passports to do so; he would admit they intended to remain citizens of and domiciled in the United States. He would attempt to prove merely that these men, under their contract, went over there for the duration of the war, plus such additional time as might be necessary for Lockheed to perform its contract with the Army.

Whereupon,

MAURICE VERNER MILLER

was called as witness for respondent and testified that he was then acting British Vice-Consul in the British Consulate General at Los Angeles; that the principal part of his work is issuance of visas to American citizens for travel to the British Isles. Being shown a copy of a visa issued to an employee of Lockheed Overseas Corporation, he was asked if such visa permitted the holder thereof to remain indefinitely in the British Isles. He replied that the visa would permit the holder to remain for the purpose for which it was given as an employee of Lockheed, and if Lockheed terminated the work over there, he would be expected to depart within a reasonable time when transport was available, and subject to any extensions that might be given him by the Home Office in London, or local authorities in Belfast. This visa is valid for three months. Now actually that means that it must be utilized within a period of three months, but the period which the gentleman might stay there is not defined in the visa as he reads it.

Whereupon,

MICHAEL DOWNS,

called as a witness for and on behalf of himself, the petitioner, testified in part as follows:

I am now living at 246 North Avenue 49, Los Angeles. Eleanor J. Downs is my wife, and was

my wife when I went ocerseas, and we had three children at that time.

Prior to embarking, we were instructed and were under restrictions about leaving the boat, or about communicating with any person. Early in the afternoon we all ate lunch and they took us into a large room with guards outside the door, and we were not to talk to anyone or use the telephones, and we stayed in that [62] room and we were all told our instructions and why we were there. It was going to be a secret mission and they didn't want anyone to know about it. It was an Army colonel—an Air Force colonel, that told us about that, and from then on we were not able to communicate with anyone. We were immediately taken from that room and lined up, put in busses and taken to the boat, and put on it, and from then on we couldn't get off, and had to stay on the boat all together. We were going away on a war mission and it had to be kept a secret. We were down below decks. We never did get up on deck. We landed in Glasgow, Scotland, about fifteen days later, after being chased all over the ocean by submarines.

I was taken down to an RAF base with nineteen other men to help them get some ships into the air that had been damaged. A lot of the other men had gone to Ireland, but I myself, with some other men, were sent to a base outside of Liverpool, to help the RAF men out, to get their ships into the air.

In 1942 I was a field and service mechanic, but at that time the man that was over us, he had given me some men to work with me, to instruct them,

which I did. I took them with me up to this Royal Air Force base. We stayed over there—well, I went back and forth, off and on, for quite a while, because later on I had battle damage crews over there, repairing ships that were shot up,—the American air force, the English air force, and including the Polish air force. We helped to repair some of their ships. We lived all over England. We went through some bombings. Five of them in one week.

I went to Ireland, I think it was the latter part of July or the first of August, and then I went back to England again [63] after that to work, as I say, with these battle damage crews, English air force, and the American air force.

When I went over I intended to stay until the war was over. I didn't know how long it was going to be, but I knew they needed men pretty bad. So I volunteered to go, signed my contract and went. They asked me to stay, so I did, stayed till the last one. During 1942 and 1943 I had no way of knowing when I might return to the United States.

In my application for overseas service, I was informed that I couldn't take my wife with me. During most of my time overseas, I lived at various bases in England and Ireland. Board and lodging was provided for by either the British Army or Lockheed Overseas Corporation or the American Air Force.

The condition in my contract was that ten per cent of the money I earned during 1943 from LOC was paid to me overseas and ninety per cent deposited to my account in California, here. When the

war was over, I naturally intended to return to the U. S. on account of having my family here. I returned to the United States in July, 1944.

I didn't pay any income taxes to the Government of North Ireland or to the United Kingdom during 1943 or for any other year. I was never asked to pay a tax by anyone. No attempt was made to withhold tax on the 90% of my income that was kept in the U. S. after June, 1943. Nothing was ever held out of that, not even social security was held out of that.

Whereupon,

BELMONT WESLEY MESSER,

called as witness for petitioner, testified in part as follows: [64]

At the time of the organization of the group of Lockheed Overseas men that went over to Britain and Ireland, my position was that of manager of the Industrial Relations department of Lockheed Overseas Corporation. Before we left to go overseas, it was necessary to employ about three thousand men between the middle of January and the first of July, 1942. We were very much under the direction of the Army. It became necessary for us to appeal to organizations throughout the United States in order to obtain the very specialized types of mechanics that we needed. We went into the engine factories back east, and watch repair plants for skilled instrument people, and at that time re-

ceived co-operation in the form of telegrams from General Arnold to practically all manufacturers in the United States to release to us such essential personnel as we felt we needed. The base in Ireland had a much wider scope than simply maintenance. In fact, as we went along it became more and more of a modification base. As the aircraft that were developed in this country were sent to the war fronts, and put into operation, it was determined that under flying conditions and under actual wartime conditions, several weaknesses existed. As these men returned from missions, bombing missions and all sorts of flying missions over Europe, the faults of aircraft as produced in this country were determined, and it was the responsibility of our base, in behalf of the Eighth Air Force and Ninth Air Force, to redesign and rebuild as necessary the aircraft that was being sent to us to the Army, in order to make them maximumly effective in service. That made the base very much subject to bombing by the German fliers. Due to the nature of the project, and the uncertainty of people returning, we were instructed by the management of the corporation [65] to make the picture to the individuals about to be employed as black as possible. We knew we were going over there at the time when the submarine hazard was the greatest during the entire war. Our contracts stipulated that we were more or less on our own, if taken prisoner, and at the time the men were going over we pointed out to them the possibility of being taken prisoner or being bombed, or being sunk by a submarine, was very serious.

I was in North Ireland from approximately June 26th of 1942 continuously until the first part of July, 1944. The project was referred to as Operation Magnet. The total number of American citizens at any one time on the base was in the vicinity of three thousand. The total number of employees, counting those who came over and returned before the completion, brought the total number of people who went to the project and returned, to approximately five thousand and four hundred.

Whereupon,

LEWIS R. OSGOOD,

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

When the Lockheed Overseas group was being organized early in 1942, I was Personnel division supervisor for them (under Mr. Messer). Personally, in the early part of 1942 and approximately in May, I was sent east for a short period to interview a number of applicants in the various aircraft and accessory plants, and our instructions were to paint rather a black picture, or one which indicated the possibilities, so that they would understand, and discourage anyone who might be there just for the trip, although this first contract they were signing was for only six months. In [66] our interview,

however, we got their reaction to a longer period of time, as the form which has been produced before the court notes, and in our conversation we were not interested, would not employ anyone who was not interested in staying at least a year, and if there was an indication of a return even at that time, we were somewhat doubtful because we felt that it was a long term project.

Approved:

/s/ J. P. WENCHEL, C.A.R.

Received and filed March 24, 1947. [67]

United States Circuit Court of Appeals
for the Ninth Circuit

Docket No. 9643

MICHAEL DOWNS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITIONER'S DESIGNATION OF
CONTENTS OF RECORD ON REVIEW

Petitioner hereby designates for inclusion in the record on review in the above entitled proceeding, the following:

The complete record of all the proceedings and evidence taken before The Tax Court of the United States and all matters required by Subdivision (g) of Rule 75 of the Federal Rules of Civil Procedure; excepting exhibits filed as evidence, but including the statement of evidence in this cause heretofore prepared, served and filed.

Dated March 13th, 1947.

/s/ ROBERT A. WARING,
Attorney for Petitioner.

Service admitted March 21st, 1947.

No counter designation will be filed.

/s/ J. P. WENCHEL, C.A.R.

Received and filed T.C.U.S. March 24, 1947. [68]

The Tax Court of the United States
Washington

Docket No. 9643

MICHAEL DOWNS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CERTIFICATE

I, Victor S. Mersch, clerk of The Tax Court of the United States, do hereby certify that the foregoing pages, 1 to 68, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 31st day of March, 1947.

[Seal] /s/ VICTOR S. MERSCH,
Clerk, The Tax Court
of the United States.

[Endorsed] No. 11578. United States Circuit Court of Appeals for the Ninth Circuit. Michael Downs, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of The Tax Court of the United States.

Filed April 4, 1947.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

